No. 80-581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

-against-

STATE OF MONTANA, THOMAS L. JUDGE, GOVERNOR OF MONTANA, MARY CRAIG, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and DAVID M. LEWIS, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees,

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE

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BRIEF OF AMICI CURIAE

This brief, submitted by Amici Curiae in support of appellants, will discuss the following questions:

1. Is a state severance tax on coal which has the practical effect of imposing a burden on interstate commerce subject to commerce clause scrutiny?

2. Does the commerce clause permit a state to tax without limit the severance of coal when substantially all of the burden of that tax is exported to out-of-state purchasers of the coal, and the taxing state realizes the full cost of mining impacts from revenue sources other than the severance tax?

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BRIEF OF AMICI CURIAE

INTEREST OF THE AMICI CURIAE AND STATEMENT

Amici are members of Congress from the States of Connecticut, Iowa, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin. They represent States and localities that are economically distressed. Without exception, these States confront a cycle of economic decline: high unemployment, budget deficits, lagging economic growth, reduction of local government services, and severely deteriorating public infrastructures. The general economic decline of the industrial regions and urban areas of the United States is in part a result of the high cost and short supply of energy in the States represented by Amici.

As members of Congress, Amici have participated in the development of national energy policy intended to reduce the

country's dependence on imported oil. This policy pursues energy independence by two means: stimulation of domestic production of oil and gas through decontrol of prices;[1] and promotion of greater use of other sources of energy, particularly coal.[2]

As a direct result of these national policies, businesses and individual families in the Northeast-Midwest region of the country have become increasingly dependent on coal mined in the Western States. Federal clean air policies further promote the use of Western coal because of its relatively lower sulfur content.[3]

Sixty-eight percent of this invaluable resource—lower sulfur coal—is mined in the states of Montana and Wyoming. Three-quarters of Montana's coal is actually owned by the United States government, and developed pursuant to leases issued to private producers. In 1975 and 1976, Montana imposed a 30% severance tax on the value of coal. Mont. Code Ann. §§15-35-101 *et seq.* Under the provisions of long-term purchase contracts, the full amount of this tax is passed forward to out-of-state purchasers. Appellants Appendix 53. Thus, more than 90% of the Montana severance tax at issue in this lawsuit is exported. The burden is borne not by Montana taxpayers, but by users and consumers of coal in other parts of the country, including the regions represented by Amici.

Montana now realizes more than $60 million a year from its exported severance tax. By constitutional amendment, half of these vast revenues are placed in permanent trust for future use in Montana. Mont. Const. Art IX, §5. The balance of the funds are used to pay for governmental services within the State. This enormous income has permitted Montana to make

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[1] Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3350, 3358; Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, amended by Energy Policy and Conservation Act of 1975, Pub. L. 94-163 (authorizing exemptions from controls), 15 U.S.C. §760a.

[2] See, e.g., Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289; Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871.

[3] Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et. seq.*,as amended, 42 U.S.A. §1857 *et seq.*

sizeable reductions in the property, income and excise taxes imposed upon local residents. 1979 Montana Laws, Ch. 698, amending §§15-30-112, 15-30-114, 15-300-122, and 15-30-142, M.C.A.

If the current tax rates do not change, the States of Minnesota, Iowa, Illinois, Indiana, Wisconsin, Michigan, Ohio and New York alone will pay an estimated $240.4 million in coal severance taxes each year to Montana and Wyoming by 1987.[4] And if the decision of the Montana Supreme Court in this case stands, these coal-rich states will be free to increase the tax by 100%, or 1000%, or any amount they please, exacting billions of dollars annually from out-of-state interests dependent upon Western coal. The prospect is not a fantasy. The state of Alaska, for example, with only 400,000 residents, anticipates oil severance and royalty tax revenues alone of $128 *billion* between 1980 and 1996.[5]

This circumstance imperils the federal system. Unless this Court acts to safeguard the national economy against the individual States' exploitation of a fortuity—the location of natural resources—the prospect looms of a energy wealth gap dividing the nation into warring camps. A few States rich in mineral deposits foresee overflowing coffers, vast improvements in public services, substantial elimination of local and state tax burdens, and the benefits of widespread economic prosperity, all by reason of State exploitation of energy resources through the device of exported taxes. The rest of the nation, dependent for its survival on these costly sources of energy, faces deficits, deterioration and decline.

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[4] Estimate based on demand projections in Argonne National Laboratory, A Survey of Electrical Utility Demand for Coal, August, 1979. The projected payments were calculated by Irwin M. Stelzer, President, National Economic Research Associates, Hearings on H.R. 6625 and H.R. 6654 before the House Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, 96th Cong., 2d Sess., June 5, 1980.

[5] Alaska Dept. of Rev., Petroleum Production Revenue Forecast, Quarterly Report, September, 1980. (The state also contains massive gas reserves and anticipates producing substantial quantities of gas from these reserves before the end of the decade. More severance tax and royalty revenues derived from this gas production will also accrue to the Alaska state government by the year 2000.)

Obviously the Congress has some responsibility to deal with this national wealth gap. In the 96th Congress, bills were introduced and hearings held on proposals to limit state severance taxes and adjust the federal aid formulae which now perversely enhance the benefits to energy-rich states. Since the beginnings of the republic, however, the judiciary has acknowledged its obligation to protect both the national economy and the federal system against State actions which jeopardize them—particularly when the State taxes or regulations in question divide the nation and threaten to stalemate the national legislature.[6] In the 1980's, an exported State tax which compels families and businesses in Michigan or New York to pay the cost of Montana's schools, roads and health facilities is simply the tariff on interstate trade in contemporary form. If unchecked by this Court, the exorbitant severance tax on essential energy resources may become the latest variant of the kind of divisive and recriminatory State action which made the Constitutional Convention essential.

The Commerce Clause represents the framers' response to the threat of balkanizing local measures that imperilled the economic future of a fledging nation. It rests with this Court today, as it has from the beginning of the republic, to assert the importance of the Union against the contemporary version of the tollgate on the channels of trade.

Summary of Argument

State severance taxes which affect interstate commerce are subject to judicial scrutiny under the Commerce Clause. The Montana courts erred in relying on *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) and similar cases to conclude that the State was immune from Commerce Clause constraints regardless of the effects or burdens its tax imposes on the nation's economy. Whatever the Commerce Clause standard for examining State taxes which affect interstate commerce, when virtually all the burden of the State tax is exported, and the taxing revenues bear no relation at all to the State's interest because its

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[6] See generally L. Tribe, American Constitutional Law 319-374 (1978).

services and impacts are fully covered by other revenues,[7] the tax violates the Commerce Clause. And in scrutinizing State taxes affecting interstate commerce, the Court must examine the practical effects of the tax on the national economy. When no political or economic constraints exist to limit a State's exploitation of its natural resource, the Court must determine whether the tax revenues bear a fair relation to the State's needs. If the revenues derived from an exported tax are clearly disproportionate to the State's benefits, the tax must fall.

ARGUMENT

I. A STATE SEVERANCE TAX ON COAL WHICH AFFECTS AND BURDENS INTERSTATE COMMERCE IS SUBJECT TO COMMERCE CLAUSE SCRUTINY

The practical effects of the Montana severance tax on coal are plainly subject to scrutiny under the Commerce Clause.[8] This Court's decisions have continuously affirmed that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the states . . . [Thus] even without implementing legislation by Congress [the Commerce Clause] is a limitation upon the power of the states." *Freeman v. Hewit,* 329 U.S. 249, 252 (1946); see also *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 328 (1977).

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[7] Under federal law governing mineral lands leasing, the State received 50% of all federal royalties on leases within the State. Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437 as amended by Pub. L. No. 94-377, 90 Stat. 1083, 30 U.S.C. §191. The federal government must spend an additional 40% on reclamation projects in the State. Id. In 1978, Montana received $7.5 million in federal land mineral leasing royalties, $12.8 million in other federal subsidies related to local production and $12.4 million in state land leasing revenues. (In that year, coal severance taxes yielded $44.7 million.) These figures are projected to increase dramatically through the 1980's. See J. Appleton and J. Kingsley, Western Energy Production, State of New Jersey Office of Policy and Planning (1980).

[8] Article I, Section 8, Clause 3 of the Constitution provides that: "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

And at least since 1942, it has been well settled that the commerce power reaches activities local in nature but having a substantial effect on interstate trade. *Wickard v. Filburn,* 317 U.S. 111, 122 (1942). The decisions of this Court for the past forty years have rejected mechanical tests of immunity for intrastate activities, including the immunity from Commerce Clause scrutiny conferred upon State mining taxes by the decisions upon which the Montana courts relied in this case. *Heisler v. Thomas Colliery Co.,* 260 U.S. 245 (1922); *Oliver Iron Co. v. Lord* 262 U.S. 171 (1923); *Hope Gas Co. v. Hall,* 274 U.S. 284 (1927). In *Wickard,* Justice Jackson returned the Court to the principle set forth earlier by Marshall and Holmes. *Gibbons v. Ogden,* 9 Wheat. 1 (1824); *Swift & Co. v. United States,* 196 U.S. 375 (1905). In sustaining the exercise of national power over intrastate activity, Justice Holmes observed, "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." 196 U.S. at 398 (1905). While *Wickard* and similar cases specifically reject mechanical immunities for intrastate activities in the course of upholding federal legislative regulation of local activities affecting commerce, the Commerce Clause constraint applies as well to state taxes or regulations which apply to local actions but have an effect and impose burdens on interstate trade. *Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Lewis v. B.T. Investment Managers, Inc.,* 100 Sup.Ct. 2009, 2116-17 (1980); *Pike v. Brice Church, Inc.,* 397 U.S. 137, 140 (1970); *Nippert v. City of Richmond,* 327 U.S. 416, 423-24 (1946). If a local farmer growing winter wheat for his own consumption on a few acres of land is subject to scrutiny under the Commerce Clause, *Wickard v. Filburn,* 317 U.S. 111 (1942), surely Montana's tax—with its devastating effect on the nation's economy, the supply of energy resources, and the balances of fiscal federalism—warrants review as well.

In fact, on no fewer than five occasions in the past four years, this Court has declared that a State tax assessed on a local activity will be sustained only if it is applied to functions having a substantial nexus to the State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. See *Washington*

Rev. Dept. v. Stevedoring Association, 435 U.S. 734, 750 (1978); *Complete Auto Transit Inc. v. Brady,* 320 U.S. 274, 279 (1977); *Mobil Oil Corp. v. Commissioner of Taxes of Vt.,* 100 Sup. Ct. 1223, 1234 (1980); *Exxon Corp. v. Wisc. Dept. of Rev.,* 100 Sup. Ct. 2109, 2122 (1980); *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434, 444-45 (1979).

The Montana courts' conclusion that the tax here at issue is absolutely immunized from constitutional constraint thus disregards in letter and spirit two generations of jurisprudence in which the Commerce Clause has been regularly applied both to the exercise of federal power and to state taxes and regulations affecting interstate commerce. *Wickard v. Filburn,* 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1979); *Philadelphia v. New Jersey,* 437 U.S. 617, 622-23 (1978); *Lewis v. BT Investment Managers, Inc.* 100 Sup. Ct. 2009, 2016-17 (1980). Indeed, in the functional terms by which the tax must be evaluated, it is in fact comparable to the tax on gas in transit which the Court found to be flatly prohibited by the Commerce Clause. *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954). See Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 232-233 (1957).

II. THE MONTANA SEVERANCE TAX ON COAL VIOLATES THE COMMERCE CLAUSE BECAUSE IT IS SUBSTANTIALLY PAID BY OUT-OF-STATE PURCHASERS OF COAL AND THE REVENUES BEAR NO RELATIONS TO THE STATE'S SERVICES.

When the practical effects of Montana's tax on coal are examined, the Commerce Clause limits on State taxing power must be found to invalidate the levy. In plain terms, neither economic nor political constraints inhibit the State's ability to exact payments from the out-of-state consumers who purchase its coal. On the one hand, the nation's demand for low sulfur coal—stimulated by an international oil crisis and promoted further by federal energy and environmental policies—effectively eliminates market constraints on the level of the State tax. On the other hand, since more than 90 percent of the tax is paid by out-of-state purchasers according to the terms of

their contracts with producers, no political forces restrain the State legislature's decision. With some severance taxes the question of incidence is debatable, turning on a complex analysis of market dominance, industry, structure, the mobility of labor or capital, the availability of substitute products, and the type of tax at issue. See R.A. Musgrave. The Theory of Public Finance, 287-299 (1959); Gillis & McClure, "The Distributional Implications of the Taxation in Natural Resources," 61 Rice University Studies 143 (1975). In the case of Montana's coal severance tax, the export feature of the tax is conceded, and laid bare by the long term purchase contracts. Appellants Appendix 53.

Montana contends that coal producers, the nominal taxpayers, were politically active in the State legislative process which had led to the adoption of the tax. But the legislative reports demonstrate that the dramatic increase in the tax rate to 30% produced none of the controversy characteristic of state taxing decisions. See, e.g., Representative Ora Halvorson of Kalispell, Montana, Vice Chairman of the Montana House Taxation Committee, quoted in the Missoulian, January 11, 1975. The legislature saw, and seized, an opportunity to enrich Montana's treasury without any burden to the state, without any effect on the state's residents, without any pain to the State's own taxpayers.

This Court has long recognized the special dangers from exported tax burdens. "[T]o the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrich v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n. 2 (1940). In invalidating state taxes on local activities involving the solicitation of local sales which are inextricably linked with the interstate commerce of the out-of-state selling, the Court has indicated that "provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the Commerce Clause was put in the fundamental law to guard against." *Nippert v. City of Richmond*, 327 U.S. 416, 434 (1946).

It was just this type of threat from provincial state efforts to exact tribute at the expense of interstate trade that brought the delegates to Philadelphia in 1787. States controlling strategic ports and trade routes exploited their neighbors, who responded with reprisals and recriminations. Trade rivalries jeopardized the Union and destroyed the Confederation. In Hamilton's words, the framers agreed upon the Commerce Clause as a device to suppress "interfering and unneighborly regulations of some states . . . [which might be more] serious sources of animosity and discord . . . if not restrained by a national control." The Federalist No. 22 (A. Hamilton). Madison spoke at the Convention of the "rival, conflicting and angry regulations" which required a general power in Congress to limit the ambitions of parochial states. 3 Farrand, Records of the Federal Convention 547 quote in *Hood v. DuMond*, 336 U.S. 525, 534 (1949). As this Court has observed, "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several states." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

In 1787, the states' favorite strategem was the tariff on trade or the barrier at the state border. In 1981 the technique most often employed is the exported tax burden. Energy-rich states exploit the dependence of others on their resources by increasing severance taxes. As in the 1780's, those less advantaged states retaliate, attempting to tax local activities in ways that put the burden to pay on out-of-state interests. See, e.g., *Boston Tax Exchange v. State Tax Commission*, 429 U.S. 319 (1977), (invalidating New York's differer stock transfer taxes as discriminatory); *Mobil Oil Corp. et al v. Dubno* et al ____F.Supp.____ (D. Conn. 1980) (invalidating a Connecticut statute prohibiting petroleum refiners and distributors from passing the state's gross receipts tax forward to Connecticut purchasers).

In circumstances such as these, where a taxing state's power is untrammeled by any normal economic or political forces, the courts must examine closely the effects of the tax. In operation, the Montana severance tax on coal is a tax on exports as plainly violative of the principle of the open economy expressed in the Commerce Clause as a tariff on trade, a tollgate at the state's border, or a tax on goods in transit. Its

effects or consequences are no different because the tax attaches to the local activity of mining rather than the interstate activity of transportation. That is the plain learning of recent cases departing from a concept of mechanical immunity for state taxes affecting interstate commerce. *Washington Rev. Dept. v. Stevedoring Association,* 435 U.S. 734, 750 (1978). Compare *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 257 (1954). Moreover, as a "tailored tax" burdening out-of-state interests without touching Montana's taxpayers, it "must receive the careful scrutiny of the Courts to determine whether it produces a forbidden effect on interstate commerce." *Complete Auto Transit Inc. v. Brady,* 430 U.S. 274, 288-289, n. 15 (1977).

Examination of the effects of this tax readily discloses the need for its invalidation. When exported to out-of-state purchasers who depend on the natural resources at issue, excessive severance taxes have two detrimental effects. Plainly, interstate trade in coal—a goal of national policy adopted in the 1970's—is burdened by an unlimited state power to exact severance levies. Of equal importance to the national economy, however, is the distorting effect on the fiscal balance of the federal system. Decisions of this Court establish that the activities of state and local governments affecting commerce are subject to the commerce power just as much as the activities of private economic interests. See, e.g. *Fry v. United States,* 421 U.S. 542, (1975); *California v. Taylor,* 353 U.S. 553 (1957); *United States v. California,* 297 U.S. 175, (1936).[9] When excessive, exported severance taxes of a few states have the effect of distorting the federal system, the national economy is threatened no less than it is when state taxes or regulations discriminate against private interstate trading activity or impose multiple burdens on private commercial transactions. See, e.g., *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977); *Norfolk and Western Railway Co. v. Missouri State Tax Commission,* 390 U.S. 317 (1968); *Hale v. Bimco Trading Inc.,*

[9] At least since 1976, of course, the exercise of the commerce power is subject to a special immunity from federal regulations intruding unduly into state sovereignty interests. *National League of Cities v. Usery,* 426 U.S. 833 (1976).

306 U.S. 375 (1939); *Nippert v. City of Richmond,* 327 U.S. 416 (1946); *General Motors Corp. v. District of Columbia,* 380 U.S. 553 (1965).

The effect of Montana's unlimited taxing power over the severance of coal, if confirmed by this Court and combined with the equivalent power of other energy-rich states, will be to transfer billions of dollars annually from consuming states in the nation to these few energy rich states.[10] The resulting wealth gap can only exacerbate other social and economic conditions afflicting the older industrialized states and urban areas of the Northeast-Midwest region. The inevitable consequence is precisely the kind of divisive rivalries and recriminating actions which the Commerce Clause was adopted to prevent.

The State of Montana and the lower courts contend that even if the Court's "practical effect" standard of review applies to severance taxes, the relevant part of that test—the requirements that the tax bear a fair relation to state services— is satisfied without any factual inquiry, simply on the ground that Montana exists as a government and provides the benefits of a civilized society. This is so, the State maintains, even though the Governor of Montana concedes in Congressional testimony that the State's needs are more than satisfied by its share of federal royalty payments, and even though the State also realizes other tax revenues from coal mining. See Testimony of Governor Thomas Judge, Surface Mining Control and Reclamation Act of 1977: Hearings on S7 before the Senate Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess. 629 (1977); Montana Code Ann. 15-38-104 (Resource Indemnity Trust Tax); 15-6-132 (Gross Proceeds Tax); 15-6-138(B) (Property Tax on Mining Equipment); 15-31-101 *et seq.* (Corporate License Tax).

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[10] Recent studies estimated increased state revenues resulting solely from oil price decontrol at approximately $112 billion during the next decade. Congressional Budget Office, The Windfall Profits Tax: A Comparative Analysis of Two Bills, November, 1979, p. 22.

To interpret the "fair relation" requirement in this fashion is to reduce it to a nullity. Each state government provides public services and affords the benefits of a civilized society. This status affords it a wide latitude in taxing local activities, including mining. But it cannot free the State's actions entirely from any judicial examination. When the state tax is substantially paid by out-of-state consumers; the state's service needs are fully covered by other state and federal revenues; and market and political constraints on the state's taxing decisions are wholly absent, then the Commerce Clause must limit the state's power adversely to affect the national economy.

Both Appellants and Amici concede that Montana has the power to tax mining activity, including the power to exact some severance tax. But there exists a point when that severance levy amounts to a tax on exports. As such, it burdens the open economy of the nation, distorts the federal system and must be invalidated. In some future cases that line may be difficult to detect. It will require the lower courts to examine through factual testimony and evidence the incidence of the tax, the existence of political and market constraints, the relation of taxing revenue to the state's needs. This is, of course, a traditional function of the judiciary in our system of government. But this tax fails by any standard involving examination of its practical effect and consequences. It is straightforwardly a tax on exports. It gives Montana vast wealth without any local burden and it involved not the slightest economic or political constraints on state legislative decisions. Its effects on other states and on the national economy, as measured by fiscal distortions in the federal system, are enormous.

It is no answer to insist that judicial examination of state energy taxes may founder on the difficult cases ahead. There are always difficult cases confronting this Court. More important, this is not that difficult case. The extremity of the factual situation presented here is best appreciated by attempting to envision a precise analogue involving another state resource. Imagine a circumstance in which Maryland and Louisiana fishermen accounted for 70% of the nation's crabs; 90% of these crabs were consumed in other states. A severe national drought

substantially eliminated beef, poultry and other domestic protein sources. International political developments made it essential that the United States reduce, not expand, its beef and poultry imports. The Congress adopted numerous statutes to promote crab consumption. In most of the country, there existed no substitute for Maryland and Louisiana crabs. The Maryland legislature imposed a 100% tax on the value of crabs produced in the state. The tax yielded revenues, paid by out-of-state purchasers pursuant to their contracts with Maryland producers, which permitted Maryland to reduce all other state and local taxes, to add new and improved public services, and to create a permanent trust fund with annual per capita contributions equal to the remaining per capita tax burden on Maryland residents—all without any political opposition within Maryland, and without any effect on the volume of crab production, which continued to increase dramatically each year. Congress debated the problem of national dependence on Maryland crabs and the Maryland tax on exports, but did not act.

In another comparable case the Court would exercise its historic role and subject the tax, as Justice Frankfurter put it, "to the scrutiny which the Commerce Clause requires so that interstate commerce may enjoy freedom from State taxation outside of those narrow limits within which states are free to burden such commerce." *Capital Greyhound Lines v. Brice,* 339 U.S. 542, 548 (1945). In protecting the national interest in this hypothetical example against one state's aggrandisement of its monopoly over an essential food supply, the Court might well recall Justice Cardozo's statement: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). But, the length to which one must go in devising a case analogous to this one underscores its extremity, and makes plain that in enforcing the Constitution here, the Court would neither cabin state discretion in taxing decisions nor render susceptible to judicial revision the overwhelming proportion of state levies.

Appellees further contend that the "practical effects" analysis which the Court has now substituted for mechanical and formalistic immunities is a "one-way ratchet," available only to allow state taxes on interstate activities so that "interstate commerce pays its way." *Western Livestock v. Bureau of Revenue,* 303 U.S. 250, 254 (1938). See also *Freeman v. Hewit,* 329 U.S. 249, 253 (1946). Nothing in the Court's recent decisions supports this view. Indeed, the import of the recent cases is that the Court has adopted for *all* purposes a standard recognizing that the commerce among the states which the Constitution safeguards is "not a technical conception, but a practical one." *Swift v. United States,* 196 U.S. 375, 398 (1905).

The several states cannot be expected always to be sensitive to the values to the nation of political and economic interdependence. In this case, the Court has the opportunity to affirm for the future an enduring principle of economic interdependence; to put content into its evolving "practical effects" standard for review of state taxes which burden interstate commerce, and to check this contemporary pattern of interstate rivalries and state efforts to export the burdens of government. At root, what is at issue here is whether taxpayers in Minnesota or Ohio, already subject to high taxes, high energy costs, high inflation and all that follows, may be obligated to pay as well for Montana's governmental services. If the lower court decision stands without modification, Montana and other energy-rich states will be as free as the appellees maintain to increase their severance taxes without limit. Without any of the usual constraints from either the market or the political arena, the tax may be set not at 30%, but 100% or 1000% of the value of coal taken from the ground. If New York attempted to exact vast revenues from other states whose residents depended upon its financial and cultural facilities, or if Florida disproportionately increased its taxes on tourism, the market would provide alternatives to New York's facilities or Florida's sunshine. But as a result of world-wide economic events, energy-rich states like Montana have come to hold the country hostage. Montana's coal is vital to energy needs in other

regions. There are no available substitutes. To permit unlimited taxation of exported natural resources simply because the state attaches the tax to local mining is to divide the nation and imperil its economic integrity.

CONCLUSION

For the reasons set forth above, the judgement below dismissing the complaint should be reversed.

Respectfully submitted.

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January 22, 1981